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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



C₁

DATE: **APR 25 2012** OFFICE: CALIFORNIA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Special Immigrant Religious Worker Pursuant to Section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), as described at Section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, (“the director”) denied the employment-based immigrant visa petition. The petitioner filed a motion to reopen the director’s decision, and the director affirmed the denial of the petition. The petitioner then filed an appeal. The AAO will dismiss the appeal.

The petitioner is a church. It seeks to classify the beneficiary as a special immigrant religious worker pursuant to section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), to perform services as a pastor. On June 16, 2009, the petitioner filed a Form I-360 petition. On July 28, 2010, the director denied the petition. On August 30, 2010, the petitioner filed a motion to reopen the director’s decision. On October 14, 2010, the director granted the motion to reopen but again denied the petition. The director denied the petition because she found that the beneficiary had not been continuously working in lawful status for at least the two-year period immediately preceding the filing of the petition.

On appeal, the petitioner submits a statement and further documentation in order to overcome the director’s decision.

Section 203(b)(4) of the Act provides classification to qualified special immigrant religious workers as described in section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C), which pertains to an immigrant who:

- (i) for at least 2 years immediately preceding the time of application for admission, has been a member of a religious denomination having a bona fide nonprofit, religious organization in the United States;
- (ii) seeks to enter the United States--
 - (I) solely for the purpose of carrying on the vocation of a minister of that religious denomination,
 - (II) before September 30, 2012, in order to work for the organization at the request of the organization in a professional capacity in a religious vocation or occupation, or
 - (III) before September 30, 2012, in order to work for the organization (or for a bona fide organization which is affiliated with the religious denomination and is exempt from taxation as an organization described in section 501(c)(3) of the Internal Revenue Code of 1986) at the request of the organization in a religious vocation or occupation; and
- (iii) has been carrying on such vocation, professional work, or other work continuously for at least the 2-year period described in clause (i).

The issue here is whether the beneficiary possesses two years of continuous lawful work experience immediately prior to the filing of the form I-360 petition. The regulation at 8 C.F.R. § 204.5(m)(4) states that:

(m) *Religious workers.* This paragraph governs classification of an alien as a special immigrant religious worker as defined in section 101(a)(27)(C) of the Act and under section 203(b)(4) of the Act. To be eligible for classification as a special immigrant religious worker, the alien (either abroad or in the United States) must:

* * *

(4) Have been working in one of the positions described in paragraph (m)(2) of this section, either abroad or in *lawful immigration status* in the United States, and after the age of 14 years continuously for at least the two-year period immediately preceding the filing of the petition. The prior religious work need not correspond precisely to the type of work to be performed. A break in the continuity of the work during the preceding two years will not affect eligibility so long as:

- (i) The alien was still employed as a religious worker;
- (ii) The break did not exceed two years; and
- (iii) The nature of the break was for further religious training or for sabbatical that did not involve unauthorized work in the United States. However, the alien must have been a member of the petitioner's denomination throughout the two years of qualifying employment.
(Emphasis added).

The regulation at 8 C.F.R. § 204.5(m)(11) states that:

(11) *Evidence relating to the alien's prior employment.* Qualifying prior experience during the two years immediately preceding the petition or preceding any acceptable break in the continuity of the religious work, must have occurred after the age of 14, and if acquired in the United States, must have been *authorized under United States immigration law*. If the alien was employed in the United States during the two years immediately preceding the filing of the application and:

- (i) Received salaried compensation, the petitioner must submit IRS documentation that the alien received a salary, such as an IRS Form W-2 or certified copies of income tax returns.
- (ii) Received non-salaried compensation, the petitioner must submit IRS documentation of the non-salaried compensation if available.

- (iii) Received no salary but provided for his or her own support, and provided support for any dependents, the petitioner must show how support was maintained by submitting with the petition additional documents such as audited financial statements, financial institution records, brokerage account statements, trust documents signed by an attorney, or other verifiable evidence acceptable to USCIS.

If the alien was employed outside the United States during such two years, the petitioner must submit comparable evidence of the religious work.
(Emphasis added).

The current Form I-360 petition was filed on June 16, 2009. According to the regulation above, the beneficiary must have been continuously working in lawful status for two years immediately prior to the filing of the petition, from June 16, 2007 to June 16, 2009. According to the petitioner's Form I-290B appeal statement, the beneficiary had been working for the [REDACTED] from June 16, 2007 to March 28, 2008. From March 28, 2008 to May 1, 2008, there was a break in employment as a minister while relocating from Jamaica to Florida. From May 1, 2008 to December 31, 2008, the beneficiary worked full time as a minister for [REDACTED] in Florida, and from January 1, 2009 until June 16, 2009, the beneficiary was employed full time as a minister for the petitioner.

The director found that the beneficiary did not meet the requirements of the regulation at 8 C.F.R. § 204.5(m)(4) because:

The beneficiary entered the United States on March 17, 2008 in a classification of J-2, spouse of a J-1 exchange visitor. The accompanying spouse and minor children of a J-1 exchange visitor may accept employment only with authorization by USCIS. No evidence has been submitted to show such authorization had been granted to the beneficiary.

Since the evidence show the beneficiary was working in the United States since his arrival in 2008, and that employment was not authorized by USCIS, or IRS documentation, the petitioner has not shown the beneficiary has the qualifying experience during the two years immediately preceding the filing of the application and thus, meets the regulations stated above.

On appeal, the petitioner submitted two Employment Authorization Documents ("EADs") that United States Citizenship and Immigration Services ("USCIS") issued to the beneficiary. The petitioner also explained on appeal that, "the first of these employment authorization cards was in J-2 visa status. The second was as a result of filing an I-485 Application For Adjustment of Status." The EADs show that USCIS authorized the beneficiary to work from February 28, 2008 until the filing date of the petition, but the beneficiary had a break in his employment during part of January

2008 and from March 28, 2008 until May 1, 2008. Therefore, the beneficiary has not met the requirements of the regulation at 8 C.F.R. § 204.5(m)(4). The regulation at 8 C.F.R. §204.5(m)(4)(i)-(iii) states that a break in continuity will be authorized only if the alien was (i) still employed as a religious worker, (ii) the break did not exceed two years, (iii) and the nature of the break was for further religious training or for a sabbatical. The beneficiary does not meet these requirements. The petitioner on appeal called this period “a break in employment,” which means that the beneficiary did not satisfy part (i) of the regulation because the beneficiary was not employed during this period. Further, the nature of the break was not for further religious training or sabbatical, as required by part (iii) of the regulation. The break was taken so that the beneficiary could relocate from Jamaica to Florida. Therefore, the beneficiary does not satisfy this part of the regulation. For this reason, the appeal will be dismissed.

The petitioner also did not satisfy the regulation at 8 C.F.R. § 204.5(m)(11) which requires that if the alien was employed in the United States during the two years immediately preceding the application and received salaried compensation, the petitioner must submit IRS documentation that the alien received a salary, such as an IRS Form W-2 or certified copies of income tax returns. If the beneficiary was employed outside the United States during these two years, the petitioner must submit comparable evidence of religious work. In this case, the petitioner stated that the beneficiary worked in Jamaica from June 16, 2007 through March 28, 2008. However, as required by the regulation above, the petitioner did not provide the Jamaican equivalent of an IRS Form W-2 or an IRS Form 1099, or certified tax returns. The petitioner only submitted pay stubs from the beneficiary’s prior work experience in Jamaica and a letter from the prior employer, which is not sufficient to satisfy the regulation above. Therefore, the AAO finds that the petitioner has not established that the beneficiary was continuously working during the period that he was in Jamaica.

Further, the AAO finds that the beneficiary had not been continuously working after arriving in the United States. According to the petitioner, the beneficiary had been working for the [REDACTED] in Florida from May 1, 2008 to December 31, 2008 and then for the petitioner from January 1, 2009 to June 16, 2009. During this time period, the petitioner submitted an IRS Form 1099 showing that the [REDACTED] in Florida paid the beneficiary \$16,950 in 2008. The petitioner also submitted a letter from the [REDACTED] stating that the beneficiary worked there in August of 2008 to help run an outreach program. For these services the beneficiary was paid \$1,800. Even though neither the petitioner nor the [REDACTED] stated the beneficiary’s monthly salary during this period, the salary paid during the period of time stated is not sufficient to show that the beneficiary was working continuously during this period.

The record does not support the petitioner’s contention that the beneficiary had been working continuously for the petitioner from January 1, 2009 until June 19, 2009. The petitioner has not submitted IRS Forms W-2, IRS Forms 1099, or certified copies of the beneficiary’s IRS tax returns for this year to show that the petitioner had been working “full time for the petitioner” as the petitioner contends on appeal during this period. Further, the record does not support the petitioner’s contention on appeal that the beneficiary had been working continuously during this period. In several letters that the petitioner submitted to the AAO prior to the appeal, the petitioner states that it

was only in June of 2009 that the beneficiary began working for the petitioner, not on January 1, 2009 as the petitioner states on appeal. For example, in a letter dated December 14, 2009, the petitioner states that the beneficiary has been working for its church since June 6, 2009. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

Because of the absence of IRS Forms W-2 and certified copies of the beneficiary's tax returns, as well as an inconsistency in the record as to when the beneficiary began to work for the petitioner, the AAO finds that the petitioner has not shown that the beneficiary worked continuously in 2009 as well.

The director further stated that:

It should be further noted: Under Section 212(e) of the Immigrant and Nationality Act (INA), no person admitted under Section 101(a)(15)(J) of the Act should be eligible to apply for an immigrant visa until it is established that such person has resided and been physically present in the country of his nationality or his last residence for an aggregate of at least two years following departure from the United States. There is no evidence to show the beneficiary has met this requirement or has obtained a waiver.

On appeal, the petitioner rebuts this by stating that:

USCIS was in error in considering whether [REDACTED] had fulfilled the two year foreign residence requirement of section 212e of the Immigration and Nationality Act. Whether he has fulfilled that requirement or obtained a waiver of that requirement is relevant only upon consideration and adjudication of his Form I-485 Application for Adjustment of Status.

If the alien is subject to the two-year foreign residency requirement, then he or she is barred under section 212(e) of the INA from filing an application for an immigrant visa or permanent residence, or an application for adjustment of status under any section of the law. This immigrant visa petition is not covered in the restrictions of section 212(e). In this case, the petitioner may file a petition for the beneficiary despite the beneficiary having J-2 status over the two years immediately preceding the filing of the petition. Therefore, this part of the director's decision will be withdrawn.

While the AAO will sustain the appeal in part, the petitioner failed to show that the beneficiary continuously worked in lawful status for the entire two years immediately preceding the filing of the petition. Therefore, the AAO will uphold the decision of the director.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.